SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

JOHN Q. WOOD, Registrar, Walthall County;
EDD CRAFT, Sheriff, Walthall County;
BREED O. MOUNGER, City Attorney,
Tylertown, Mississippi;
MICHAEL L. CARR, District Attorney,
Fourteenth Judicial District, Mississippi ..... Petitioner

vs.

UNITED STATES OF AMERICA ..... Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

CITATIONS TO OPINIONS BELOW

The decision of the United States District Court for the Southern District of Mississippi rendered September 21, 1961, is not reported, and is set forth in the Appendix hereto, infra, p. 37a. The opinion of the Fifth Circuit Court of Appeals is reported at 295 F. 2d 772, and is set forth in the Appendix hereto, infra, p. 1a.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on October 27, 1961, R. 176. A motion for rehearing filed by petitioners was denied by the Fifth Circuit Court of Appeals on November 30, 1961, R. 182. The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A., Section 1254(1).

QUESTIONS PRESENTED

A. Is the State of Mississippi an indispensable party to an action restraining or enjoining a criminal prosecution under a valid criminal statute of the State of Mississippi?

B. Was the denial of the motion for temporary restraining order by the District Court appealable?

C. Is the United States prevented from maintaining this action because of the operation of Title 28 U.S.C.A., Section 2283?

D. Was the United States District Court under a mandatory duty to exercise its equitable jurisdiction under Title 42 U.S.C.A., Section 1971(d) in this case?

E. Does Title 42 U.S.C.A., Section 1971 authorize the maintenance of an action to restrain or enjoin a state criminal prosecution under a valid state criminal statute?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the following constitutional provision and statutes of the United States, the full text of which will be set out in an appendix hereto:

The Eleventh Amendment to the Constitution of the United States.

Title 28 U.S.C.A., Section 1291.

Title 28 U.S.C.A., Section 2283.

Title 42 U.S.C.A., Section 1971.

STATEMENT OF THE CASE

On September 7, 1961, John Hardy, a negro citizen of Nashville, Tennessee, was arrested in Tylertown, Walthall County, Mississippi on a charge of breach of the peace, and was incaregrated in the county jail located in that town on that charge.

Hardy posted a $100 bond on September 8, 1961, and was released from jail pending his trial before a Justice of the Peace of Walthall County, Mississippi, which was set for September 22, 1961.

On the afternoon of September 20, 1961, respondent brought an action in the United States District Court for the Southern District of Mississippi under Title 42 U.S.C.A., Section 1971(b), (c), (d), to restrain the prosecution of John Hardy in the state court on the state criminal charge and for other injunctive relief. The complaint filed by respondent alleged that the effect of the criminal prosecution of John Hardy would be to deter and discourage qualified negro citizens of Walthall County, Mississippi from attempting to register to vote, and the complaint also alleged that said prosecution of John Hardy was intended by petitioners to have that effect. Pursuant to its complaint, respondent filed a motion for temporary restraining order without notice to restrain the prosecution of Hardy pending a hearing on the motion for temporary injunction. The District

Court refused to grant the restraining order without notice, and set the matter down for hearing for September 21, 1961, at 1:30 P. M. The only matter considered by that Court on that hearing was the restraining of the state criminal prosecution of John Hardy.

At the conclusion of this hearing, and after both sides had been heard, the District Court refused to issue the temporary restraining order prayed for by the United States.

Counsel for the United States, pursuant to Title 28 U.S.C.A., Section 1292(b), then moved that the District Court issue a certificate that the case involved a controlling question of law as to which there was substantial grounds for a difference of opinion and that an appeal might materially advance the ultimate determination of the litigation, and said counsel also moved for a stay of the state criminal proceedings pending this appeal. The District Court denied this motion.

Counsel for respondent then advised the Court that an immediate appeal of the order denying the motion for temporary restraining order would be taken, and on the night of September 21, 1961, counsel for respondent and one of the counsel for petitioners appeared before Honorable Richard T. Rives, Judge of the United States Court of Appeals for the Fifth Circuit, at Montgomery, Alabama. At that time, it was agreed among the parties that the criminal prosecution in the state court would be stayed until an appeal of the denial of the temporary restraining order was heard by the Fifth Circuit Court of Appeals.

Oral argument on the appeal was heard by the Fifth Circuit Court of Appeals on October 3, 1961, and on

October 27, 1961, the Fifth Circuit Court of Appeals rendered its opinion reversing the judgment of the District Court, and ordering the District Court to grant the temporary restraining order staying the criminal prosecution of John Hardy prayed for by the United State. Petitioners seasonably filed a motion for rehearing which was denied by the Fifth Circuit Court of Appeals on November 30, 1961.

REASONS FOR THE ALLOWANCE OF THE WRIT

As shall appear from the argument to follow, this writ should be allowed for the following reasons: (1) the decision of the Fifth Circuit Court of Appeals in this cause is in conflict with the decisions of other Courts of Appeals on the same matter; (2) the Fifth Circuit Court of Appeals in this cause has decided an important question of federal law which has not been, but should be, settled by this Court; and (3) the Fifth Circuit Court of Appeals has in this cause decided a federal question in a way in conflict with applicable decisions of this Court.

That there is a basis for each of the reasons above assigned for the allowance of this writ may be shown by a brief discussion of each of the questions presented by this case as heretofore set out.

1. Is the State of Mississippi an Indispensable Party to an Action Restraining or Enjoining a Criminal Prosecution Under a Valid Criminal Statute of the State of Mississippi?

It is a well-settled rule enunciated by this Court in a long line of cases down to the present time that an action

to enjoin the enforcement of, or prosecutions under, a valid state criminal statute is a suit against a State, and barred by the Eleventh Amendment of the Constitution of the United States.

There has been no proof or even allegation made in this cause that the Mississippi breach of the peace statute under which John Hardy was to be tried on September 22, 1961, is unconstitutional or void on the grounds of repugnance to the Constitution of the United States or any statute enacted pursuant thereto.

In this case, for the first time in the history of American jurisprudence, a Federal Court has undertaken to enjoin a State prosecution under a valid State criminal statute.

This Court dealt with this question with great clarity and lucidity in the case of *Harkrader v. Wadley*, 172 U.S. 148, 43 L. Ed. 399. Because the facts of the *Harkrader* case are somewhat similar to the facts in the instant case, it might be of aid to the Court to state the brief factual setting of the *Harkrader* case.

Wadley was indicted in a Virginia State Court on a charge of embezzling funds from a bank at Wytheville, Virginia. Prior to the indictment, certain creditors of the bank had brought a civil action against Wadley in the Federal Circuit (District) Court in Virginia.

Wadley then requested and received a temporary injunction from the Federal Circuit Court of Virginia enjoining the Commonwealth's Attorney and two special prosecutors from taking further proceedings on the indictment.

In discussing the validity of the injunctions issued by the federal court against the Commonwealth's Attorney and the two special prosecutors of Wythe County, Virginia, this Court said at 172 U.S. 163-164, 43 L. Ed. 404:

"Two propositions have been so firmly established by frequent discussions of this court as require only to be stated:

"First. When a state court has entered upon the trial of a criminal case, under a statute not repugnant to the Constitution of the United States, or to any law or treaty thereof, and where the state court has jurisdiction of the offense and of the accused, no mere error in the conduct of the trial can be made the basis of jurisdiction in a court of the United States to review the proceedings upon a Writ of Habeas Corpus. (Citations)"

"Second. When a state court and a court of the United States may each take jurisdiction of a matter, the tribunal where jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed and the jurisdiction invoked is exhausted; and this rule applies alike in both civil and criminal cases. (Citations)"

"In the present case it is not contended that the state statute, under which the county court of Wythe County was proceeding, was repugnant to the Constitution or any law of the United States, or that the state did not have jurisdiction of the offense charged and of the person of the accused."

At 172 U.S. 168-169, 43 L. Ed. 406, this Court further discusses the effect of the injunctions enjoining the State criminal prosecution:

"Embezzlement by an officer of a bank organized under a state statute is not an offense which can be inquired into or punished by a Federal Court. Such an offense is against the authority and laws of the state. The judicial power granted to their courts by the Constitution of the United States does not cover such a case. The circuit court of the United States for the western district of Virginia could not, in the first instance, have taken jurisdiction of the offense charged in the indictment, nor can it, by a bill in equity, withdraw the case from the state court, or suspend or stay its proceedings."

"In both of the injunctions pleaded in answer to the return of the sheriff the Attorney of the Commonwealth of Virginia for Wythe County was named as such, and was thereby prohibited from all further prosecution of the indictment pending in the county court of Wythe County in the name of the *Commonwealth of Virginia v. H. G. Wadley*, charged with embezzlement of the funds of the Wythe Insurance and Banking Co."

"No case can be found where an injunction against a state officer has been upheld where it was conceded that such officer was proceeding under a valid state statute. *In the present case the Commonwealth Attorney, in the prosecution of an indictment found under a law admittedly valid, represented the State of Virginia, and injunctions were therefore in substance injunctions against the state. In proceeding by indictment to enforce a criminal statute the state can only act by officers or attorneys, and to enjoin the latter is to enjoin the state.* As was said in *Re Ayres*, 123 U.S. 443, 497 [31:216, 227]: 'How else can the state

be forbidden by judicial powers to bring actions in its name, except by constraining the conduct of its officers; its attorneys, and its agents? And if all such officers, attorneys, and agents are personally subjected to the powers of the Court so as to forbid their acting in its behalf, how can it be said that the state itself is not subjected to the jurisdiction of the court as an actual and real defendant?' " (Emphasis Added)

In 1908 this Court rendered its decision in the case of *Ex Parte Young*, 209 U.S. 123, 52 L. Ed. 714. This case involved an action brought by stockholders of a railroad company to enjoin the enforcement of certain Minnesota Rate Acts alleged to be in contravention of the "due process clause" of the Fourteenth Amendment to the Constitution of the United States. Among the defendants in this action brought in Federal Court was Edward T. Young, Attorney General of Minnesota, who plaintiffs sought to enjoin from enforcing the Rate Acts alleged to be unconstitutional.

When the case reached this Court, the Court first found that the Minnesota Rate Acts under attack were void as being in conflict with the "due process clause" of the Fourteenth Amendment.

In dealing with Young's contention that the injunction was in essence one against the State of Minnesota, and thus barred by the Eleventh Amendment of the Constitution of the United States, this Court held that when a suit was brought against an officer of the State to enjoin him from enforcing an *unconstitutional* State law, that the suit was against the individual who held the State office, and not against the State.

This Court has followed the rule laid down in the *Harkrader* case, as modified by *Ex Parte Young* in a long line of cases, among which are: *Western Union Telegraph Co. v. Andrews*, 216 U.S. 165, 54 L. Ed. 430; *Davis & Farnum Manufacturing Co. v. Los Angeles*, 189 U.S. 207, 47 L. Ed. 778; *Packard v. Banton*, 264 U.S. 140, 68 L. Ed. 596; *Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 69 L. Ed. 402; *Cline v. Frink Dairy Co.*, 274 U.S. 445, 71 L. Ed. 1146; *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 82 L. Ed. 268; *Watson v. Buck*, 313 U.S. 387, 85 L. Ed. 1416; and *Georgia Railroad and Banking Co. v. Redwine*, 342 U.S. 299, 96 L. Ed. 335.

Since the District Court had no jurisdiction of this cause because of the lack of an indispenable party defendant, petitioners pray that this Court reverse the order of the Fifth Circuit Court of Appeals entered November 30, 1961, pursuant to its opinion rendered October 27, 1961, and direct the Fifth Circuit Court of Appeals to remand this cause to the United States District Court for the Southern District of Mississippi with instructions to dismiss the complaint filed by respondent because of the lack of an indispensable party defendant.

B. Was the Denial of the Motion for Temporary Restraining Order by the District Court Appealable?

In its opinion in this cause, the Fifth Circuit Court of Appeals acknowledged that neither this Court nor any of the other circuits had ever held that the denial of a temporary restraining order may under certain circumstances be considered a final decision within the meaning of 28 U.S.C.A., Section 1291. The Fifth Circuit went on to say that this Court has given Section 1291 a "practical effect" in some recent decisions. The Circuit Court of

Appeals then concluded that in order to give Section 1291 a "practical effect" in this case, that the denial of the District Court of the motion for temporary restraining order should be considered "final" within the meaning of that section.

The chief case relied on by the Fifth Circuit to reach this conclusion was *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541. Here, again, petitioners rely upon the rule long adhered to by this and other courts that a rule of law as stated in a case should be confined to the general facts and circumstances out of which that case arose. Petitioners believe that the proper disposition of this issue would be served by a brief examination of the *Cohen* case.

In that case, plaintiff brought a stockholder's derivative action against a corporation in the U. S. District Court in New Jersey. New Jersey had a state statute requiring persons in plaintiff's class who brought such an action to be liable for reasonable expenses and attorney's fees of the defense if plaintiff failed to make good his complaint and entitling the corporation to indemnity before the case could be prosecuted.

The corporate defendant moved to require security under the New Jersey statute. The District Court held that the state statute was not applicable to the action in federal court, and denied the motions, from which ruling plaintiff appealed.

The Court of Appeals reversed the holding of the District Court, and the question presented to this Court was the appealability of the order of the District Court.

In discussing the appealability of the order of the District Court, this Court said at 337 U. S. 546:

"Nor does the statute permit appeals, even from fully consummated decisions, where they are but steps towards final judgment in which they will merge . . . This decision appears to fall in that small class which finally determines claims of right *separable from*, and collateral to, rights asserted in the action, too important to be denied review and *too independent of the cause itself* to require that appellate consideration be deferred until the whole case is adjudicated." (Emphasis Added)

And in the case of *Swift & Company v. Compania Caribe*, 339 U.S. 684, also relied upon by the Fifth Circuit Court of Appeals this Court stated at 339 U.S. 689:

"Under these circumstances the provisions for appeals only from final decisions in 28 U.S.C., Section 1291 should not be construed so as to deny effective review of *a claim fairly severable from the context of a larger litigious process.*" (Emphasis Added)

It is clear beyond cavil that the denial of a temporary restraining order, in this or any other case, is not "separable from" or "independent of the cause itself"; nor is such denial "fairly severable from the context of a larger litigious process."

It thus follows that the facts and circumstances of this case do not come within the exceptions created by *Cohen* and *Swift*, but rather fall within the general rule.

In the case of *Carroll v. United States*, 354 U.S. 394, 1 L. Ed. 2d 1442, in dealing with the right of the United States to appeal under 28 U.S.C.A., Section 1291 from an order suppressing evidence, Mr. Chief Justice Warren

cogently stated the correct rule when he stated (354 U.S. 405, 1 L. Ed. 2d 1449):

> "Appeal rights cannot depend on the facts of a particular case. The Congress necessarily has had to draw the jurisdictional statutes in terms of categories."

Petitioners say that the category of "denial of temporary restraining orders" was not intended to be, and is not, appealable.

This Court has subsequently dealt with the problem of appealability under 28 U.S.C.A., Section 1291 in the case of *Parr v. United States*, 351 U.S. 513, 100 L. Ed. 1377. In that case, the government obtained an indictment against Parr in the Corpus Christi Division of the United States District Court for the Southern District of Texas on charges of income tax evasion.

Parr moved to remove the cause to the Laredo Division of that Court, which motion was granted by the District Court. The government then obtained another indictment against the defendant on the same charges in the Austin Division of the Western District of Texas. The next day it moved the Corpus Christi Division to dismiss the first indictment, to which motion Parr vigorously objected. The Court granted the order of dismissal, from which Parr appealed to the Fifth Circuit Court of Appeals. That Court held that the order of dismissal was not appealable and dismissed the appeal.

The defendant in that case relied on the *Cohen* and *Swift* cases, supra, in support of his contention that his appeal fell within the exception to the "finality" rule. This Court gave that argument short shrift. In discuss-

ing *Cohen* and *Swift*, supra, this Court said (351 U.S. 519, 100 L. Ed. 1384):

> "In those cases, orders made during the course of a litigation were held appealable because they related to matters outside the stream of the main action and would not be subject to effective review as part of the final judgment in the action. Unlike the orders in those cases, this order was but a 'step toward final disposition of the merits of the case' and will 'be merged in the final judgment.'"

In light of the foregoing holdings of this and other federal courts, petitioners say that the denial of a temporary restraining order is not appealable, regardless of the facts in a particular case. To hold otherwise would not be to give a "practical effect" to Title 28 U.S.C.A., Section 1291, but would torture that statute and give it a grossly impractical effect.

Petitioners fail to understand how it could be denied that the granting or denial of a temporary restraining order is "but a step toward final disposition of the merits of the case" and will "be merged in the final judgment." If petitioners' contentions are correct, then this case falls within the language of this Court quoted above from the *Cohen* and *Parr* cases, supra.

On this basis, petitioners contend that the Fifth Circuit Court of Appeals had no jurisdiction to hear this cause, and petitioners pray that this Court reverse the order of the Fifth Circuit Court of Appeals entered herein and reinstate the order of the District Court denying the motion for temporary restraining order.

C. Is the United States Prevented From Maintaining This Action Because of the Operation of Title 28 U.S.C.A., Section 2283?

Title 28 U.S.C.A., Section 2283 provides as follows: "A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress; or where necessary in aid of its jurisdiction, or to promote or effectuate its judgments."

In its opinion in this case, the Fifth Circuit Court of Appeals construed the case of *Leiter Minerals v. United States*, 352 U. S. 220, 1 L. Ed. 2d 267 as meaning that Section 2283 does not apply to *any* action in which the United States is a plaintiff or complainant. The *Leiter Minerals* case is the only authority cited by the Court in support of the proposition that Title 28 U.S.C.A., Section 2283 does not apply to cases in which the action is brought by the United States.

Petitioners take it to be the rule that when this Court announces a rule or interpretation of law that said rule or interpretation should be confined to the general facts and circumstances of the case out of which it grew. For this reason petitioners think it desirable and necessary to briefly examine the facts and circumstances out of which the decision of this Court in *Leiter Minerals v. United States* grew, so that we may better understand that decision of this Court.

The *Leiter Minerals* case began with an action in the State Courts of Louisiana attacking the title and possession of certain mineral lessees of the United States to lands claimed or owned by the United States. Defend-

ants in the State Court action moved in the State Court to remove the action to the United States District Court on the grounds that the suit was in essence one against the United States and that only the United States District Court had jurisdiction of the subject matter of the State Court action, which was to try title to lands owned or claimed by the United States. The State Court overruled the motion to remove the case to the United States District Court. Defendants in the State Court action and the United States then moved in the United States District Court in and for the Eastern District of Louisiana for an injunction staying proceeding in the State Court and removing the case to the Federal Court on the grounds set out above.

This Court in *Leiter Minerals* was faced at the threshold with the question of whether the United States District Court properly stayed the proceedings in the State Court or whether such stay was improperly issued because of Title 28 U.S.C.A., Section 2283.

In Footnote 3, 352 U.S. 226, 1 L. Ed. 2d 273, of the opinion in the *Leiter Minerals* case this Court cited some eight cases as authority for the proposition that 2283 does not apply to actions wherein the United States is a party plaintiff.

There is a common characteristic between *Leiter Minerals* and the cases cited in Footnote 3 thereof which distinguishes each and all of these cases from the instant case.

In *Leiter Minerals* and the cases cited therein, Federal District Courts enjoined the proceedings in State Courts so that the action might be tried in the only tribunal with jurisdiction to hear it, the United States District Court.

In *Leiter Minerals* and the other cases upon which it rests, the Federal Courts had *exclusive jurisdiction* of the subject matter of the suits pending in the State Courts, and the various States were not interested or indispensable parties to these suits, while here, the State Courts of Mississippi have *exclusive jurisdiction* of the subject matter of the action pending in the State Court, the trial of John Hardy on a charge of breach of the peace, and here the State of Mississippi, which respondent erroneously failed to join as a party defendant in this cause, is vitally interested in maintaining the integrity of its criminal processes under *valid* and *constitutional* state statutes.

It is certain that John Hardy cannot be tried for the crime of breach of the peace in a Federal Court. The State Courts of Mississippi have exclusive jurisdiction over that offense.

The Fifth Circuit Court of Appeals misinterpreted this Court's opinion in *Leiter Minerals* when it came to the conclusion that the doctrine of comity which underlies Title 28 U.S.C.A., Section 2283, does not apply to *any* action brought by the United States.

Thus, although it may be argued that doctrines of comity do not apply in cases with factual situations similar to *Leiter Minerals*, it would be to blink reality to say that the doctrine of comity should not be invoked in its strongest application to the case at hand, in which the criminal process of a sovereign State under a valid criminal statute have been paralyzed.

That this Court intended to confine its holding in *Leiter Minerals* to the fact situation and the nature of

the interests there involved is shown by the language of this Court at 352 U.S. 226, 1 L. Ed. 2d 273:

> "It is always difficult to feel confident about construing an ambiguous statute when the aids to construction are so meager but the interpretation excluding the United States from the coverage of the statute *seems to us preferable in the context of healthy federal-state relations.*" (Emphasis Added)

Can it be said that in the situation presented by *this* case that the interpretation excluding the United States from the coverage of 2283 is preferable "in the context of healthy federal-state relations?" The question provides its own answer. From the standpoint of the several states, to so contend would be a cruel jest, for if the interpretation placed on *Leiter Minerals* by the Fifth Circuit Court of Appeals is sanctioned by this Court, then petitioners say that in the field of the administration and enforcement of criminal law the United States of America will no longer be a *federal system* of dual sovereignties but it will be a *centralized system* with supervisory powers over the day-to-day problems of state and local law enforcement flowing from the seat of the Central Government to its fifty administrative divisions.

A review of *Leiter Minerals* and the cases above mentioned all in Footnote 3 of that opinion reveal that the rule exempting the United States from the coverage of Section 2283 has been confined to those cases in which the Federal Courts had exclusive jurisdiction of the subject matter of the actions pending in State Court, and in which the United States was attempting to protect a *property interest*, and in which the State Court actions enjoined were of a *civil* and not *criminal* nature. Peti-

tioners say that the Fifth Circuit Court of Appeals in this case unjustifiably expanded this ruling to encompass actions in which the State Court has exclusive jurisdiction of the subject matter in the case pending before it, in which the rights asserted by the United States are incorporeal and intangible and in which the action enjoined in the State Court is criminal, not civil in nature.

An insight into the rationale of *Leiter Minerals* is afforded by a brief examination of the case of *United States v. Taylor's Oak Ridge Corp.*, 89 F. Supp. 28, one of the cases cited by this Court in Footnote 3 (352 U.S. 220, 1 L. Ed. 2d 273) of *Leiter Minerals*.

In the *Taylor's Oak Ridge Case*, a corporation brought suit in a State Court of Tennessee to enjoin an agent of the United States from ousting the corporation from possession of real and personal property. The United States then brought an action in the Federal District Court to restrain the State Court proceedings, contending that the State Court suit was in fact against the United States. In discussing the jurisdiction of the Federal Court to enjoin the State Court proceedings, that Court at 89 F. Supp. 30 said:

> "There is no conflict between sovereignties. The State of Tennessee is not a party litigant. Nor is it a party in interest. No police power of the state is infringed."

The *Taylor Oak Ridge* case and all other cases cited in Footnote 3 of this Court's opinion in *Leiter Minerals* and the *Leiter Minerals* case itself show a scrupulous regard for the doctrines of comity, and Petitioners say that the Fifth Circuit Court of Appeals was not justified

in jettisoning this doctrine as embodied in statutory form in light of the subsisting decisions of this and other Federal Courts.

The reliance of the Fifth Circuit Court of Appeals on the case of *Morrison v. Davis*, 252 F. 2d 102, Cert. Den. 356 U.S. 968 in support of the argument that the doctrine of comity as announced in *Douglas v. The City of Jeannette* has been eroded and is not applicable to this case, is misplaced. *Morrison* merely held that the enforcement of an unconstitutional state statute which provided criminal penalties for its violation could, under certain circumstances, be enjoined. This is far different from the question here presented. Respondent here does not seek to enjoin the enforcement of a void state criminal statute.

In the *Morrison* opinion, the Fifth Circuit Court of Appeals cited *Browder v. Gayle*, 142 F. Supp. 707, Aff. 352 U.S. 903, as controlling. In a companion case to *Browder v. Gayle*, *Browder v. City of Montgomery, Alabama*, 146 F. Supp. 127, a question much more analogous to the question at hand was disposed of by the District Court. In that case, certain persons sued to enjoin city officials of Montgomery from instituting threatened criminal proceedings against them. The Court denied the relief sought, citing the doctrine of comity.

Petitioners say that the rule announced by this Court in *Douglas v. City of Jeannette* has lost none of its vitality, as witness the fact that since the rendering of the opinion in *Morrison v. Davis*, this Court has reaffirmed *Douglas v. City of Jeannette* in the case of *Wilson v. Schnettler*, 365 U.S. 381, 385. Also see *Pugach v. Dollinger*, 277 F. 2d 739, Aff. (per curiam) 365 U.S. 458.

D. Was the United States District Court Under a Mandatory Duty to Exercise Its Equitable Jurisdiction Under Title 42 U.S.C.A., Section 1971(d) In This Case?

In its opinion in this cause, the Fifth Circuit Court of Appeals held the Federal Courts do not operate under common-law equitable and discretionary doctrines in actions brought by the United States under the Civil Rights Act of 1957, but, rather, operate under a mandatory jurisdictional statute.

Petitioners submit that the Congress which enacted the Civil Rights Act of 1957 did not intend to transform the Federal District Courts into mere administrative agencies compelled to exercise their equitable jurisdiction at the behest of the Attorney General of the United States, and that the use by the Fifth Circuit Court of Appeals of "legislative history" to give the Act that effect was erroneous, in that, among other reasons, the prerequisite ambiguity in the Act was not found.

The exercise of jurisdiction by the District Courts cannot be considered to be mandatory and not discretionary, for to so consider it would strip the Courts of every vestige of those fundamental principles upon which equity jurisdiction traditionally and constitutionally rest.

Equity jurisdiction is what the Courts declare it is, not what Congress says it is. Congress does not possess the power to define equity jurisdiction, and any attempt by Congress to deprive Courts of Equity of their traditional and constitutional rights and powers would be palpably unconstitutional as an invasion of the judiciary power.

For example, the right of trial by jury is established by the Seventh Amendment of the United States Constitution in suits at common law. Congress cannot convert an action at law into an action in equity by legislative enactment and thereby deprive a defendant of whatever right he may have to a jury trial.

If the interpretation of the Civil Rights Act given by the Fifth Circuit Court of Appeals should prevail, then the Attorney General of the United States, with foreknowledge that state criminal prosecution of an individual was going to be had on a certain day, could wait until less than forty-eight hours preceding the state trial and file a complaint and motion for temporary restraining order in the name of the United States under Title 42 U.S.C.A., Section 1971, to restrain the state prosecution, and the District Court *would have no choice* but to grant the relief prayed for.

It might be said that one should not presume that the Attorney General would act in such manner to disrupt the criminal processes of a state, but the answer is that this is exactly what has happened in this case.

As to the point that a Federal District Court should not set aside the considered judgment of the Attorney General of the United States in bringing an action to enjoin or restrain a state criminal prosecution, petitioners say that it is completely within the province of the District Court, in administering equal justice under the law, to set aside the judgment of any administrative or executive functionary.

Petitioners are aware of the rule that "the sovereign can do no wrong," but say that if Respondent is to avail itself of this doctrine in this case, the rule should be

paraphrased to say, "the Attorney General of the United States can do no wrong."

With due respect to the temporary occupant of that office, petitioners respectfully submit that his judgment should not be exalted to the status of that of Charles I, who once said, "I carry the law in my mouth."

E. Does Title 42, U.S.C.A., Section 1971, Authorize the Maintenance of an Action to Restrain or Enjoin a State Criminal Prosecution Under a Valid State Criminal Statute?

In Footnote 7 of its opinion in this case, (p. 10a), the Fifth Circuit Court of Appeals stated that it would not pass on the question of whether the Civil Rights Act of 1957 expressly authorized the stay of criminal proceedings in a state court. However, further on in the opinion (p. 21a) the Fifth Circuit comes to the following conclusion with reference to Title 42 U.S.C.A., Section 1971(d):

> "Since the United States has, in our opinion, stated a valid claim under the section, we read this section as directing the district court to exercise its jurisdiction."

Thus, the question of whether Title 42 U.S.C.A., Section 1971 authorized the Federal Courts to stay or restrain criminal prosecutions under valid state criminal statutes is presented for the consideration of this Court, even though in an oblique fashion.

This question should be considered in light of Title 28 U.S.C.A., Section 2283, discussed, supra, which provides that state court proceedings shall not be stayed except by an express provision of an Act of Congress. Viewed in this light, it is plain that Section 1971 does not author-

ize a stay of state court proceedings. That Section itself is the best support for this contention.

The Fifth Circuit Court of Appeals was unable to find any express authorization in Section 1971 to restrain state criminal prosecutions, so it resorted to the "legislative history" of the Civil Rights Act of 1957 in order to divine the legislative intent of the Congress that passed that Act. Petitioners say that the Fifth Circuit erred in using "legislative history" to impute to the Congress which passed the Act an intent to permit the federal courts to stay a state criminal proceeding, because "legislative history" should not be used until the Court has found the statute under construction to be vague and ambiguous. No such vagueness or ambiguity was found by the Fifth Circuit in construing this Act, and thus, that court was not justified in resorting to "legislative history."

The nature of the "legislative history" relied on by the Fifth Circuit to impute this intent to Congress is a statement by Attorney General Brownell that with the injunctive powers granted by said Act, the Government could reach the same situations which were then susceptible to action under Title 18 U.S.C.A., Section 241 and 242. The Fifth Circuit also relied on statements made by opponents of the Civil Rights Act in committee hearings and on the floor of the Senate in debate.

As to the second of these bases, the reliance by the Fifth Circuit Court of Appeals on statements made by opponents of the Civil Rights Act of 1957 is clearly erroneous. To accept the fevered and alarmed statements made in the heat of battle by opponents of that Act as a guide to the legislative intent of the Congress which

enacted the Act is contrary to all of the rules of statutory construction, even in cases in which it is permissible to resort to legislative history, of which petitioners say this is not one. See *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270, 100 L. Ed. 309; *N.L.R.B. v. Thompson Products* (9th CCA, 1944), 141 F. 2d 194; *United States v. Bize* (D.C. Neb., 1950), 86 F. Supp. 939.

As to the first basis upon which the Fifth Circuit relied in reaching its conclusion that Section 1971 expressly authorized a stay of state criminal proceedings, that Court first accepted the statement of Attorney General Brownell that all acts that could be reached under Title 18 U.S.C.A., Section 241 and 242 could be reached civilly by Section 1971.

If such a construction is to be given the Civil Rights Act of 1957, then a revolution has taken place in our Federal system of Government. For, if this construction is to be given that Act, then the supervision and control of the day-to-day actions both of public officials and private citizens will have been drawn into the voracious maw of centralism, because the range of offenses reached by Section 241 and 242 are many and varied. Section 241 has been held to reach the following cases: a conspiracy to prevent persons from acquiring title to land under the homestead laws, by instigating ficticious contests and by interferring with the occupation and improvement of the land (Roberts v. United States, 283 F. 960); a conspiracy to prevent persons from furnishing ammunitions, ships, and supplies to the Government for war purposes (Anderson v. United States, 269 F. 65, cert. den., 255 U.S. 568, 65 L. Ed. 794); and a conspiracy to injure another in exercise of civil rights because such other person in-

formed federal agents of allegedly unlawful movement of alcohol (Nicholson v. United States, 79 F. 2d 387).

This Court in *The Slaughter-House Cases*, 83 U.S. 36, 21 L. Ed. 394, after discussing the revolutionary changes that would be wrought in our federal system by expanding the "privileges and immunities clause" of the Fourteenth Amendment said (83 U.S. 78, 21 L. Ed. 409):

> "The argument, we admit, is not always the most conclusive which is drawn from the consequences argued against the application of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far reaching and pervading, so great a departure from the structure and spirit of our instructions; when the effect is to fetter and degrade the state governments by submitting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the state and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt."

Petitioners therefore say that in light of the drastic change which such an interpretation would accomplish in the relationships between the state and Federal governments and the people thereof, that the ex parte statement of the Attorney General should not be given effect by this Court.

In its opinion, Fifth Circuit Court of Appeals, after adopting the position that the Civil Rights Act of 1957 reached all of the Acts on which a person could be indicted under Title 18 U.S.C.A., Section 241 and 242, then cited the cases of *Culp v. United States* (8th CCA, 1942), 131 F. 2d 93 and *Brown v. United States* (6th CCA, 1953), 204 F. 2d 247 (p. 19a), which cases that court found held that the instigation of false charges; arrests, and prosecutions in state courts for the purpose of extorting money from their victims (*Culp*, supra) and arbitrary arrest without cause and for an ulterior purpose (*Brown*, supra) were indictable under Section 241 and or 242. The Court found that the fact situations in *Culp and Brown* were analogous to that of the instant case, and giving force to the ex parte statement of Mr. Brownell held that the instant case was reached by Section 1971.

Even if Title 42 U.S.C.A., Section 1971 were held to provide civil remedies to prevent all acts that could be reached criminally by Title 18 U.S.C.A., Section 241 and 242, which petitioners strongly deny, *Culp*, supra, and *Brown*, supra, would have no application to this present case. Title 18 U.S.C.A., Section 241 and 242 provide for punishment for the invasion of *private* and *personal* rights. The United States in this action goes to great lengths to tell us that it is not seeking to champion the rights of John Hardy, but rather the rights of unknown persons in Walthall County, Mississippi. But the only way in which petitioners could be indicted under Section 241 and 242 under the facts alleged by respondent, would be for petitioners to deprive *John Hardy* of some civil rights belonging to *him*.

Culp and *Brown* would apply to this case only if the United States was trying to protect Hardy from receiving

a sham or mock trial in the state court; but this it is not trying to do.

In this instance, the Fifth Circuit Court of Appeals has confused personal rights under the Fourteenth Amendment with rights asserted by the United States under the Fifteenth Amendment. The United States either represents itself or John Hardy in this action, and it should not be allowed to derive the benefits to be gained from representing both and to decline to accept the limitations and burdens placed on both.

For the above reasons, petitioners say that the Fifth Circuit Court of Appeals erred in holding that the Civil Rights Act of 1957 authorized a state of criminal court prosecutions.

CONCLUSION

For the reasons above set forth, petitioners pray that this Court grant this petition for writ of certiorari and review the judgment of the Fifth Circuit Court of Appeals in this cause.

Respectfully submitted,

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APPENDIX

Opinion of The United States Court of Appeals For The Fifth Circuit

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19237

UNITED STATES OF AMERICA — Appellant

vs.

JOHN Q. WOOD, ET AL. — Appellees

Appeal from the United States District Court for the Southern District of Mississippi

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(October 27, 1961)

Before RIVES, CAMERON and BROWN, Circuit Judges.

RIVES, Circuit Judge: The United States appeals from the denial of a temporary restraining order pending a hearing for a preliminary injunction.[1] The Government seeks to restrain the defendants from prosecuting one

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[1] In the alternative, if the order is not appealable, the Government insists that this Court has jurisdiction of its petition for injunction under the all-writs statute, 28 U.S.C.A. § 1651.

John Hardy, a Negro, before a Justice of the Peace in Walthall County, Mississippi. The case was filed in the Southern District of Mississippi under the Civil Rights Act of 1957, 42 U.S.C.A. § 1971 (1958), on the theory that the continued prosecution of John Hardy was designed to, and would, intimidate the qualified Negroes of Walthall County from attempting to register to vote[2] The defendants are John Q. Wood, Registrar of Walthall County; Edd Craft, Sheriff of Walthall County; Breed O. Mounger, City Attorney of Tylertown, county seat of Walthall; and Michael Carr, District Attorney of that judicial district of Mississippi. The suit was filed on September 20, 1961, just two days before the scheduled date of Hardy's trial, which was set for 9:00 a.m., September 22; service was made on the evening of September 20; the hearing on the temporary restraining order was set for September 21, when the Government submitted its case on affidavits. These affidavits were not disputed, the defendants claiming insufficient notice or time for obtaining counter-affidavits. At 5:00 p.m. on the 21st, the district court entered its decision denying the order. The district judge refused to sign a certificate under 28 U.S.C.A. § 1292 (b) allowing the Government to seek appeal of an interlocutory order. On the evening of the 21st, an attorney for the Government, accompanied by a

[2]The district court, in announcing the reasons for its decision, said: "We are not concerned in this hearing with anything outside the very sharp question as to whether or not that criminal proceeding should be enjoined." The complaint was framed in two counts, called "First Claim" and "Second Claim." The "First Claim" was limited to an attempt to enjoin the continued prosecution of John Hardy. The "Second Claim" charged a conspiracy to deprive Negro citizens of Walthall County, Mississippi, of the right secured by 42 U.S.C.A. 1971(b), of which the prosecution of John Hardy was alleged to form a part, and prayed for very broad relief.

Mississippi Assistant Attorney General representing the defendants, flew to Montgomery, Alabama, to submit to Judge Rives a petition for stay of the state prosecution pending appeal of the district court's decision. There, decision on whether the stay should issue became unnecessary when the Mississippi Assistant Attorney General commendably agreed to continue the prosecution of Hardy pending disposition of the Government's appeal. Judge Rives then entered an order expediting the appeal and setting argument for 9:00 a.m., October 3, 1961. Over the Government's objection, Judge Rives further ordered that the defendants, because of the minimum of time allowed them before the hearing in the district court, would be permitted to obtain counter-affidavits, provided they served them on the Government by September 29, and that the Government could then obtain rebuttal affidavits up until the argument on October 3. He stated that any such affidavits would be considered by this Court if that proved legally permissible.[3]

The facts as stated in the complaint and affidavits of the Government are as follows:

There are at the present time some 2,490 Negroes of voting age in Walthall County, Mississippi, none of whom

[3]Counter-affidavits have been attached to the brief for appellees. Those affidavits might properly be considered in connection with the alternative relief sought in this Court under the all-writs statute (see n. 1, supra). We are not, however, permitted to consider them if the appeal is allowed. Henneford v. Northern Pac. Ry. Co., 1938, 303 U.S. 17; Hovland v. Smith, 9 Cir., 1927, 22 F. 2d 769; New Albany Waterworks v. Louisville Banking Co., 7 Cir., 1903, 122 Fed. 776; American Bemberg Corp. v. United States, 3 Cir., 1958, 253 F. 2d 691; Seward v. South Florida Securities, 5 Cir., 1938, 96 F. 2d 964; United States v. Sinor, 5 Cir., 1956, 238 F. 2d 271; cf. Board of Supervisors of La. St. U & A & M Col. v. Ludley, 5 Cir., 1958, 252 F. 2d 372.

are registered to vote. There are some 4,530 white persons of voting age in Walthall County, a substantial majority of whom are registered. In July 1961, John Hardy, a Negro citizen, resident of Nashville, Tennessee, having completed two years at the Tennessee Agricultural and Industrial State College, came to Mississippi as a member of the "Student Non-Violent Coordinating Committee" for the purpose of encouraging Negroes to register and vote. This organization is currently sponsoring a voter registration project in Walthall, Amite, and Pike Counties, Mississippi. In early August, John Hardy and several other Negro students came to Walthall County to set up a voting registration school to teach the qualified local Negroes how to register and to encourage them to make application to the Voting Registrar. From August 18 to September 9, they conducted classes for several hours a day. In these classes, Hardy and his helpers would issue facsimiles of the necessary registration forms and a copy of the Constitution of Mississippi. Those attending the classes would practice filling out the forms, copying sections of the Mississippi Constitution, and explaining their meaning. Attendance varied from 25 to 50 each evening.

The first attempt of participants in the school to register took place on August 30, when Hardy accompanied five Negroes to the Registrar's office, where at least two completed the registration forms. Outside the Registrar's office, Hardy encountered the Sheriff of Walthall County, Edd Craft (a defendant), in the company of the editor of the Tylertown Times. The Sheriff asked Hardy a number of questions about the registration school and whether he had a driver's license. The Sheriff soon left, but the editor of the Tylertown Times interviewed Hardy more

extensively for an article which appeared on the front page of the Tylertown Times the next day. On September 5, 1961, three more Negroes went to register; on September 6, one Negro; on September 7, two Negroes. The incident giving rise to this action took place on September 7, and since then no Negroes have attempted to apply for registration in Walthall County.

On September 4, Mrs. Edith Simmons Peters, a Negro, aged 63, owner of an 80-acre farm in Walthall County, having had an eighth-grade education, attended her first registration class. On about the same day, Lucius Wilson, a Negro, aged 62, owner of a 70-acre farm in Walthall County, also started attendance. By September 6, they thought they were ready to apply and agreed to accompany Hardy to the Registrar's office the next morning. They arrived in Tylertown in Mrs. Peters' pickup truck at about 9:30 on the morning of September 7 and went to the Registrar's office in the courthouse. The Registrar, John Q. Wood, a defendant, was in an inner office; Mrs. Peters and Wilson went in and Hardy remained just outside the door. When Registrar Wood looked up, Mrs. Peters told him that they desired to register. Wood then replied that, "I am not registering anyone now. You all have got me in court and I refuse to register anyone else until this court is cleared up." John Hardy heard this from his position outside the door of the office some 5 or 6 feet away and came in. According to the affidavits of the Government, Hardy had given Wood only his name when Wood got up and said, "I want to see you John." He then brushed past Hardy into the main room and from the drawer of a desk took out a revolver. Holding the gun down by his right side he pointed to the door going outside and said, "Do you see that door, John?" Hardy

replied, "Yes." Wood told him, "You get out of it." Hardy said OK, and turned to go. Wood followed him, and just as Hardy got to the door, Wood struck him on the back of the head, saying "Get out of here you damn son-of-a-bitch and don't come back in here." Mrs. Peters and Wilson rushed on out, held Hardy up, and helped him out of the building. Hardy went first to the newspaper office, where he told the editor what had happened. The editor instructed him to get medical attention. Meanwhile, Wilson went to get the pickup truck, and Mrs. Peters helped Hardy eventually to a little cafe. Wilson returned and they headed out to the street. When asked what he was going to do, Hardy then told several people that he had better find the sheriff. Going up the street, they met the sheriff and, according to the affidavit of Mrs. Peters,

> "They met right where I was standing and the sheriff asked, 'What happened to you, boy.' John told the sheriff what had happened. The sheriff told him he didn't have no business in that courthouse. Wilson walked up at this time. The sheriff then said to John, 'If that boy (pointing to Wilson) wants to register he know (sic) how to go down to that courthouse and he don't need you to escort him. You didn't have a bit of business in the world down there. You is from Tennessee, you was in Tennessee and you ought to have stayed there.' The sheriff told him to 'Come on.' John asked him, 'Are you arresting me?' The sheriff said 'Yes.' John asked 'On what charges' and the sheriff said for disturbing the peace and bringing an uprising among the people. John said, 'Will you allow me to tell my side of the story.' The sheriff said, 'Don't give me none of your

head boy, or I will beat you within an inch of your life.' After the sheriff took John, I went home."

At the Tylertown jail, Hardy was interviewed twice during the day of the 7th — first, by the defendants Sheriff Edd Craft and City Attorney Breed Mounger, and later by the same two plus defendant Michael Carr, the local District Attorney for the State of Mississippi. That evening, because the feeling about the incident was evidently running high in the community, Hardy was transferred by the defendants to the jail in Magnolia, Mississippi. Hardy was released on bond the next morning and his trial for disturbing the peace was set for the 22nd of September.

Hardy claims in his affidavit that, about the time the formal charge was entered, the District Attorney took him into a room "and several white people whom I can't identify told me that I was in a lot of trouble and that I was asking for a lot of trouble to come down there; that they had good Negroes here and that they treated their darkies good but that I was causing a lot of trouble. The Justice of the Peace was present but the sheriff was out." There are no allegations that Hardy was otherwise mistreated in any way during his confinement.

The appellees move this Court to dismiss the appeal, and, at the very outset, this Court is faced with the question of its jurisdiction. The appeal is from the denial of a temporary restraining order. The Government admits that ordinarily the denial of a temporary restraining order is not an interlocutory order refusing an injunction

within the meaning of 28 U.S.C.A. § 1292 (a), and is not otherwise appealable.[4] The Government claims that, under the special circumstances of this case, the denial of the temporary restraining order is in the nature of a final decision from which an appeal may be taken under 28 U.S.C.A. § 1291.

The substance of the Government's case under the "First Claim" of its complaint is that the prosecution of Hardy, regardless of outcome, will effectively intimidate Negroes in the exercise of their right to vote in violation of 42 U.S.C.A. § 1971. This, it insists, is a claim entitling it to injunctive relief. As a practical matter, the time between the arrest and prosecution of a person for breach of the peace is usually very short — in this case, 15 days. If the Government states a claim entitling it to injunctive relief, then the effect of denying the temporary restraining order is to moot its case. The denial of the restraining order is thus equivalent to the dismissal of the First Claim of the complaint on the ground that it does not state a claim upon which the requested injunctive relief can be granted. To then call this de facto dismissal a nonappealable interlocutory order is to preclude review altogether. As a practical matter, then, it is clear that the denial of the restraining order is a final disposition of the Government's claimed right to prevent the prose-

[4] See Connell v. Dulien Steel Products, 5 Cir., 1957, 240 F. 2d 414; St. Helen v. Wyman, 9 Cir., 1955, 222 F. 2d 890; Mesabi Iron Co. v. Reserve Mining Co., 8 Cir., 1959, 270 F. 2d 567; Pennsylvania Motor Truck Assn. v. Port of Philadelphia Marine Terminal Assn., 3 Cir., 1960, 276 F. 2d 931.

cution of Hardy.[2] The question is whether such a practical construction may be put on the meaning of a final decision as used in § 1291.

It does not appear that the Supreme Court or any of the Circuits has directly considered whether the denial of a temporary restraining order may under certain circumstances be considered a final decision within the meaning of 28 U.S.C.A. § 1291. However, the Supreme Court has given a number of guides to be used for the construction of section 1291 and the meaning of "final" in cases concerning the appealability of orders deciding collateral issues, separable from the main claim. In *Cohen v. Beneficial Loan Corp.*, 1949, 337 U.S. 541, it was said that the purpose of § 1291 is to "disallow appeal from any decision which is tentative, informal or incomplete," or from a consummated decision which is a mere step towards a final judgment with which it will merge. The Court found, however, that the collateral issue involved in that case was not of such a nature. "When the time comes to appeal the final disposition of the case, it will be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably." The Court then held the order to be appealable within the meaning of section 1291.

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[2]One of the questions posed by the appellees is how the denial of an order can be final when, admittedly, granting it would only be interlocutory and nonappealable. A very similar issue was presented in Swift & Co. v. Compania Caribe, 1950, 339 U.S. 684. There, the collateral order involved was the vacating of an attachment on a ship under an admiralty libel. The Court pointed out that only the vacating of the attachment would have the practical effect of finally and irreparably determining the rights of the appellant to the ship, and the denial of the motion to vacate would have been only interlocutory since the rights of all the parties could have been protected pending the final determination of the primary claim. 339 U.S. at 689.

and concluded, "This Court has long given this provision of the statute this practical rather than technical construction." The rule was later summarized by Mr. Justice Frankfurter in his concurring opinion in *Sears Roebuck & Co. v. Mackey*, 1956, 351 U.S. 427, 441:

> "Thus the Court has permitted appeal before completion of the whole litigation when failure to do so would preclude any effective review or would result in irreparable injury. See Forgay v. Conrad, 6 How. 201; Cohen v. Beneficial Loan Corp., 337 U.S. 541, 545-47; Swift & Co. v. Compania Caribe, 339 U.S. 684, 688-89."

On the basis of these cases, we feel that the Supreme Court has approved a practical construction of section 1291 and that an order, otherwise nonappealable, determining substantial rights of the parties which will be irreparably lost if review is delayed until final judgment may be appealed immediately under section 1291. We, therefore, determine the denial of the temporary restraining order to be a final decision, appealable under 28 U.S.C.A. § 1291.[6]

Turning to the merits of the appeal, the Government asks the court to enjoin a state criminal court proceeding. We are immediately met with the strictures of 28 U.S.C.A. § 2283 which provides:

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[6] It is significant to note that Courts of Appeals have considered the merits of denials of temporary restraining orders in deportation cases, evidently on the theory that unless review is had the entire controversy would be mooted by the deportation of the appellant. See Shih v. Kennedy, No. 16272 (D.C. Cir., March 23, 1961); Marcello v. Brownell, No. 12838 (D.C. Cir., August 31, 1955).

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

It is the contention of the Government that this statute does not apply where the suit is brought by the United States.[2] This question was before the Supreme Court in the case of *Leiter Minerals v. United States*, 1957, 352 U.S. 220, where the United States brought suit in the federal court to protect its title to certain public lands. The issue of title was already before a state court for determination. The United States asked the Court to enjoin the state proceedings, which request was upheld on appeal. Mr. Justice Frankfurter, the architect of the strict interpretation of section 2283, and its predecessor in *Toucey v. New York Life Ins. Co.*, 1941, 314 U.S. 118, and *Amalgamated Clothing Workers v. Richman Bros.*, 1955, 348 U.S. 511, wrote for the Court, stating:

"There is, however, a persuasive reason why the federal court's power to stay state court proceedings might have been restricted when a private party was seeking the stay but not when the United States was seeking similar relief. The statute is designed to prevent conflict between federal and state courts. This policy is much more compelling when it is the litigation of private parties which threatens to draw the two judicial systems into conflict than when it

[2] The Government contends also that the Civil Rights Act of 1957, in effect, expressly authorized the stay of the proceedings in the State court, and further that such stay was necessary in aid of the jurisdiction of the federal court. We find it unnecessary to decide those questions.

is the United States which seeks a stay to prevent threatened irreparable injury to a national interest. The frustration of superior federal interests that would ensue from precluding the Federal Government from obtaining a stay of state court proceedings except under the severe restrictions of 28 U.S.C. §2283 would be so great that we cannot reasonably impute such a purpose to Congress from the general language of 28 U.S.C. § 2283 . . ." 352 U.S. at pp. 225, 226.

The Court then expressly construed section 2283 as inapplicable to a suit brought by the United States.

The appellant attempts to distinguish the *Leiter Minerals* case on the ground that the Court there dealt with the protection of federal property rights and the enjoining of state civil proceedings, and here the United States sues on behalf of a class of private citizens and seeks to enjoin state criminal proceedings. As far as the type of proceeding is concerned, the statute must be read as applicable to all state proceedings. Admittedly, the policy against interference with state criminal proceedings is stronger than that with respect to state civil proceedings,[1] but this policy is not one of statutory derivation. It applies even where section 2283 does not. Thus, the type of state court proceeding may not be used as a ground for distinguishing the *Leiter Minerals* construction of section 2283. It is also difficult to see how the nature of the interests the United States asserts can make a difference so long as the United States asserts them. The method of construction used in *Leiter Minerals* is that the statute

[1] See Ex parte Young, 1908, 209 U.S. 123, 162; Beal v. Missouri Pacific RR Co., 1941, 312 U.S. 45, 50.

will not be imputed to apply to the United States in the absence of some congressional indication to the contrary. We are unaware that Congress even considered the applicability of section 2283 to the United States, much less that it distinguished between the type of rights the United States may happen to assert.

Following further, however, the appellees' contention, they claim that the rights the United States asserts here are private rights such that applying section 2283 could not lead to the "frustration of superior federal interest" within the meaning of *Leiter Minerals*. In fact, they further contend that the lack of a federal interest precludes the Attorney General from bringing the suit under any circumstances. We are unable to agree. In *United States v. Raines*, 362 U.S. 17 (1960), the Supreme Court said with respect to a claim based on the same Civil Rights Act as this case, 42 U.S.C. § 1971:

> "It is urged that it is beyond the power of Congress to authorize the United States to bring this action in support of private constitutional rights. But there is the highest public interest in the due observance of all the constitutional guarantees, including those that bear the most directly on private rights, and we think it perfectly competent for Congress to authorize the United States to be the guardian of that public interest in a suit for injunctive relief." 362 U.S. at 27.

Thus, whatever doubt there may have been as to the right of the United States to bring the suit or as to the extent of the federal interest involved has been put to rest.

The determination that section 2283 is inapplicable to the present suit does not, however, dispose of this appeal.

For, as the Court went on to say in the *Leiter Minerals* case, "The question still remains whether the granting of an injunction was proper in the circumstances of this case." 352 U.S. at 226.

The district court in this case did not deny the restraining order on the ground that it had no jurisdiction or could not in a proper case enjoin a state criminal proceeding. Rather, it denied the motion on the ground that it was within its discretion to refuse to extend its equitable powers to interfere with a state criminal proceeding. It pointed out that, as to Hardy himself, the Government does not even contend that the state proceeding will result in irreparable injury to Hardy's constitutional rights. As for the Government's contention that the prosecution will intimidate other Negroes in Walthall County and lead to the irreparable injury of their constitutional right to vote, which injury the United States may assert under section 1971 of the Civil Rights Act, Judge Cox states:

> "In the argument it is asserted that the trial of that case tomorrow will irreparably damage the United States in deterring colored people in Walthall County from registering. That statement is without any substantial support in the record before the Court and appears as a non sequitur.
>
> . . . . . .
>
> "It is difficult to find any satisfactory definition of irreparable, but it is equally difficult to conceive how the United States can possibly be irreparably damaged by this criminal case down in Walthall County, Mississippi, regardless of its outcome."

He then goes on to base his decision on the holding of the Supreme Court in *Douglas v. Jeannette*, 1943, 319 U.S. 157, 163, where it said:

"It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction."

This same rationale is the substance of the appellees' case on appeal.

It is necessary at this point to clearly state what right the Government claims, and the facts it believes sufficient to entitle it to injunctive relief.

The Civil Rights Act of 1957, 42 U.S.C. § 1971(b), provides: "No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce . . . any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose . . ." Section 1971(c) provides: "Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection . . . (b), the Attorney General may institute for the United States . . . a civil action . . . for preventive relief, including an application

for a permanent or temporary injunction . . . " The Government states that under Mississippi law registration is prerequisite for voting in any election, such that intimidation to prevent registration is a primary means for preventing the Negro citizens of Mississippi from exercising their right to vote. The complaint sets out the acts of the defendants calculated to intimidate, which include: the Registrar striking Hardy with gun; Hardy's subsequent arrest for breach of the peace; the numerous comments indicating that the purpose of acts of the Registrar, the Sheriff and the other defendants are in part to punish Hardy for his registration activities; the interviews in jail with respect to these activities; the placing of charges known to be unjustified; and finally the scheduled prosecution for September 22. The crux of the action is then stated in paragraph XV of the complaint:

> "The continued prosecution of and participation in the criminal proceedings by the defendants is without justification and was and is being continued solely to attempt to intimidate, threaten and coerce Negro citizens of Walthall County for the purpose of interfering with the right of such Negro citizens to register and vote . . . . "

In the affidavit supporting the request for an order restraining Hardy's prosecution, the Government alleges the belief of its counsel "that, unless restrained by this Court, the act of John Q. Wood in physically striking a Negro citizen in the presence of other Negroes who were attempting to register, the act of Edd Craft in arresting and molesting a Negro citizen and the acts of all the defendants in continuing and participating in the prosecu-

tion of a Negro citizen who encouraged registration, have caused and will continue to cause, irreparable injury, loss and damage to plaintiff, the United States of America, in that the inevitable effect of such acts on the part of defendants is to deter Negro citizens in Walthall County, Mississippi, who are eligible, from exercising their right to become registered voters and to vote for federal candidates." In the argument here, and in the court below, the Government makes very clear that the rights the Government asserts are not the rights of Hardy; it assumes that Hardy will obtain a fair trial and that the existence of adequate state remedies will protect all of Hardy's constitutional rights. Hardy is not qualified to register or vote in Walthall County and the Government does not seek to assert Hardy's rights under section 1971. Rather, the Government here asserts the rights of all those Negro citizens in Walthall County who are qualified to register and vote. The rights of these citizens are not at issue in Hardy's prosecution, and remedies available to Hardy in his trial are in no way available to them. Thus, if the prosecution of Hardy does injure them, they have no adequate relief in his trial.

The question then arises how the arrest and prosecution of Hardy can irreparably injure these other citizens, especially if we must assume that Hardy will receive a fair trial and that his acquittal is a possible result. It is the contention of the Government that, under the circumstances of this case, the alleged acts of unlawfully striking Hardy, arresting him without cause, and proceeding with his prosecution constitute sufficient facts

to establish an equitable claim under the Civil Rights Act, even if Hardy were acquitted at the trial."

The legislative history of section 1971 would indicate that Congress contemplated just such activity as is here alleged — where the state criminal processes are used as instruments for the deprivation of constitutional rights. The Attorney General testified before a Subcommittee of the House Judiciary Committee that the purpose of the Act was to supplement the criminal statutes already on the books. He stated that "with these new civil powers,

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"The Government's brief sets out at length why these acts alone will cause such injury as to warrant injunctive relief.

"In spite of the fact that Negroes constitute a large percentage of the county's population, there are presently no Negro voters in Walthall County. John Hardy and others, members of the Student Non-Violent Coordinating Committee, came to Walthall County this summer to sponsor a voter registration drive. After the registration school was set up, eleven Negroes went to the registrar's office to seek to register for voting, on four different occasions, in spite of the fact that the registrar, under one pretext or another, simply refused to take any action. Since the incident of September 7, 1961, however, when John Hardy was struck by the registrar and then arrested, no Negroes have made any attempt to be registered. On the basis of the record in this Court and in view of the conditions and circumstances prevailing in Mississippi, it is most unlikely that, if the appellees are allowed to proceed with Mr. Hardy's trial, further Negro registration will take place. The blunt truth is that it can really not be expected that Negroes who have lived all their lives under the white supremacy conditions which exist in that area of Mississippi will continue their efforts to register and otherwise to exercise their rights and privileges of citizenship if, in addition to being threatened and beaten, they will also be prosecuted in state court with all that such a prosecution entails. Such prosecutions, experience has shown, not only are expensive, but it is becoming increasingly difficult for Negroes accused of offenses in the civil rights context even to secure competent legal assistance. There are no Negro attorneys in Walthall County, and scarcely a half-dozen Negro attorneys in the entire State of Mississippi. Because of the tremendous political and economic pressures brought to bear by the State of Mississippi, it is difficult, if not impossible, to secure competent white counsel for Negroes in cases such as this. Certainly this will be so if, upon success in this case, some officials of the State of Mississippi will be further emboldened to use harrassment by prosecution to an even greater extent than heretofore."

we could reach only the same situations which are now susceptible to action under the Sections 242 and 241. But, of course, we think we could do it much more effectively through the use of civil proceedings" (sources: Gov. Br. p. 11). The advantage of civil proceedings is that they may be brought into play immediately to prevent the completion or continuation of a violation of the Act, while criminal proceedings are cumbersome and are invoked only after the violation is completed. It would appear that Congress already had before it the types of activities the criminal sections reached and could thus foresee the scope of the new civil powers. In *Culp v. United States*, 8 Cir., 1942, 131 F. 2d 93; a criminal conviction under 18 U.S.C.A. § 242 was upheld where the defendants, sheriff, policeman, and magistrates, had instigated false charges, arrests and prosecutions in state courts for the purpose of extorting money from their victims. See also, *Brown v. United States*, 6 Cir., 1953, 204 F. 2d 247 (the criminal sections protect an individual from being "arrested by an officer acting arbitrarily without cause and, for an ulterior purpose"). Similarily, in *Screws v. United States*, 1945, 325 U. S. 91, 126, Mr. Justice Rutledge, concurring, stated with respect to the criminal sections that they "have safeguarded many rights and privileges apart from political ones. Among those buttressed either by direct application or through the general conspiracy statute . . . are the rights to a fair trial, including freedom from sham trials." Further, in the legislative history remarks of Southern Congressmen clearly indicate that they foresaw the intended reach of these civil sections and foresaw that injunctive proceedings in the federal court might supplant state court proceedings. We quote from the Government's brief: . . .

"Thus, Senator Johnston of South Carolina, an opponent of the bill which became the Civil Rights Act stated that (103 Cong. Rec. 11342), 'We have complete flouting of state law, complete ouster of state jurisdiction, even where it may have attached in a criminal case.' Again he said (103 Cong. Rec. 11343) that the bill 'would give the Attorney General the right to take enforcement out of the hands of the states into his own hands, to take it away from state courts, and put it in federal courts.' Senator Stennis of Mississippi reiterated this thought. He indicated (Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 85th Cong., 1st Sess., p. 94) that 'This proposed law clothes all these officials with complete power to bypass the state courts and state and federal administrative bodies. Now that is one of the most far-reaching provisions in this entire statute; is a complete bypassing of all state courts . . . .' "

Based on the allegations of the complaint, the supporting affidavits, the statutory language of section 1971 (b)-(c), and its legislative history, we are convinced that the Government states a claim for which relief is warranted.

This brings us to the district court's reliance upon *Douglas v. Jeannette, supra*, for the points that injunctive relief was not available against a state court criminal action, and that the denial of the temporary restraining order was within the court's discretion.

For a number of reasons we cannot agree with the district court's conclusion of its reliance on *Douglas v. Jeannette*. First, this suit is brought by the United States

under an obligation charged to it by the Civil Rights Act for the protection of constitutional rights in which, according to the Supreme Court in *United States v. Raines*, *supra*, there is the "highest public interest." As was also pointed out by the Supreme Court in the *Leiter Minerals* case, where the United States does seek to stay irreparable injury to a national interest, the normal equitable doctrines of comity between the court systems, doctrines which are the basis of the *Douglas v. Jeannette* rationale, have little or no bearing. Further, where the United States has instituted the suit, we must assume that the considered judgment of the Attorney General has concluded that a violation of a national interest has taken place, a judgment unbiased by the subjective opinion of the private individuals who have in fact been injured. This judgment should not be lightly put aside by the courts on a preliminary motion as in this case. Thus, the presence of the United States seriously tests the strictures of *Douglas v. Jeannette*.

Second, the court in this action is not operating under common-law equitable and discretionary doctrines, but under a mandatory jurisdictional statute. As already pointed out, the district court considered that it had jurisdiction over this action but that such jurisdiction should not be exercised to the extent of issuing the temporary restraining order. Under the applicable jurisdictional section, we do not believe the court had that choice. Section 1971 (d) states:

> "The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have ex-

hausted any administrative or other remedies that may be provided by law."

Since the United States has, in our opinion, stated a valid claim under the section, we read this section as directing the district court to exercise its jurisdiction. It might be argued that this is not a direction to exercise "equitable" jurisdiction, but both the rationale of the section and the legislative history refute this interpretation. For having established a claim, the only "preventive relief" available to the United States is injunctive relief through the federal courts. If the United States may not act until after the process of intimidation is complete, the United States no longer has available a worthwhile civil remedy for preventive relief. And, as was pointed out by the Supreme Court in the *Leifer Minerals* case, the fact that the United States has no available remedy other than action through the federal courts weighs heavily towards the conclusion that the court must grant the relief to which it is entitled. As if to support this point, subsection (d) specifically states that other remedies available to the persons on whose behalf the United States sues may not be considered as grounds for denying relief to the Government. In addition, the legislative history of section 1971 (d) indicates that when Congress said that the district courts "shall" exercise jurisdiction, it meant they shall exercise *equitable* jurisdiction. On the floor of the Senate, Senator Case of South Dakota offered an amendment to subsection (d) which would have susbstituted the term "may exercise" for "shall exercise." The purpose of this amendment, he explained (103 Cong. Rec. 13451), was to "make actions of the court permissive . . . the court would be relieved from *the mandate that it must consider an injunction* regardless of the fact that there might be a

simpler and better way to achieve the relief desired." (Emphasis added.) After strong objection to the amendment, it was defeated.

The mandatory duty of the district courts to exercise jurisdiction of proceedings under section 1971 does not, of course, indicate in any way whether such exercises shall culminate in granting or in denying the relief prayed, or in any relief. It does, however, include some opportunity for the hearing of the merits of a properly asserted claim and precludes the district court from, in effect, dismissing the claim upon the hearing of a motion for a temporary restraining order.

Finally, there is in *Douglas v. Jeannette* considerable emphasis on the nature of the injury. The allegation in that case was that members of Jehovah's Witnesses were being arrested and prosecuted under an unconstitutional ordinance because of the method of proselyting they were using in private homes. See 319 U. S. at 166 (dissenting opinion of Mr. Justice Jackson). They also claimed that the city officials threatened to continue the arrests. The nature of the injury was that, in the absence of injunctive relief, the threatened arrests and prosecutions would deter Jehovah's Witnesses in the exercise of their constitutional rights. This is precisely the nature of the injury in this case, although the activity to be enjoined is different. Here, the Government claims that if Hardy's trial continues other Negroes in Walthall County will be afraid to apply for registration for fear they will be subjected to unjustified official acts, including arrest and prosecution. At this point, it should be noticed what the Supreme Court did in *Douglas v. Jeannette*. The import of the decision is not to deny as a question of fact that

Jehovah's Witnesses were deterred in the exercise of their constitutional rights. Rather, it stated that, "No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief . . .," except in the rare instance where it can be shown that the irreparable injury is "both great and immediate." The effect of this is to say that even where an actual deterrent is found to exist by the trier of fact, it will not be judicially recognized to fulfill the equitable element of "irreparable injury." The primary reason given by the Court being one of comity — that interference with the state criminal system is not warranted when adequate safeguards exist in the state proceedings. For several reasons, we hold that this theory is not applicable to the present case.

First, section 1971 creates a cause of action in the United States for "preventive relief" where a person has intimidated or has attempted to intimidate another in the exercise of his right to vote. Where a federal statute has specifically created a cause of action for preventive relief for intimidation, it may no longer be said that this intimidation will not be judicially recognized for the purpose of establishing an equitable cause of action.

Second, we believe that the affirmative defense of adequate state remedies has been specifically removed by statute, for subsection (d) expressly states that the district court is to exercise jurisdiction without regard to whether the aggrieved party shall have exhausted other remedies provided by law. With this defense removed, there are no longer any grounds for judicially ignoring that intimidation may exist in fact or that irreparable injury is not present.

Third, this interpretation of the statute is in line with the doctrine in other federal cases in this Circuit dealing with the deprivation of constitutional rights on the basis of race or color. In an action to enjoin the enforcement of a criminal segregation statute, this Court stated in *Morrison v. Davis*, 5 Cir., 1958, 252 F. 2d 102, 103, cert. denied, 356 U. S. 968 (1958):

> "This is not such a case as requires the withholding of federal court action for reasons of comity, since for the protection of civil rights of the kind asserted Congress has created a separate and distinct federal cause of action .... Whatever may be the rule as to other threatened prosecutions, the Supreme Court in a case presenting an identical factual issue affirmed the judgment of the trial court in the Browder case [Gayle v. Browder, 142 F. Supp. 707 (M. D., Ala.), aff'd, 352 U. S. 903 (1956)] in which the same contention was advanced. To the extent that this is inconsistent with Douglas v. City of Jeannette, Pa., 319 U. S. 157 . . . we must consider the earlier case modified."

The foundation of our form of government is the consent of the governed. Whenever any person interferes with the right of any other person to vote or to vote as he may choose, he acts like a political termite to destroy a part of that foundation. A single termite or many termites may pass unnoticed, but each damages the foundation, and if that process is allowed to continue the whole structure may crumble and fall even before the occupants become aware of their peril. Eradication of political termites, or at least checking their activities, is necessary to prevent irreparable damage to our Government. On the

other hand, the temporary postponement of trial of a misdemeanor case before a justice of the peace causes either no injury or very slight injury. The public interest demanded the granting of temporary relief by the district court.

Nothing said in this opinion is intended to pass upon, or intimate any views as to the merits of the claim asserted by the United States. The importance of the case is such as to require a full hearing, either upon the motion for a preliminary injunction or upon a final hearing, including an opportunity to examine and cross-examine the witnesses. The claim should not be allowed to become moot before some such hearing can be had. To that end, unless there is a further agreement to continue the prosecution of Hardy at least until determination of the motion for preliminary injunction, the district court should grant the Government's request for a temporary restraining order.

REVERSED AND REMANDED.

CAMERON, Circuit Judge, Dissenting:

I respectfully dissent from the majority opinion in this case. The exigencies of time[1] arising from the desirability of returning to State hands the enforcement of its laws

[1]An urgency springing from the self-imposed delay of the government in beginning this action. The prosecution was instituted against Hardy in the state courts of Walthall County, Mississippi on September 7, 1961. The United States chose not to file its complaint in the present action until September 20, 1961, when it prayed for an immediate restraining order. The court below required notice to the defendants and heard and denied the motion at 5:00 P.M. September 21, 1961. As stated in the majority opinion, its author was importuned in his home at 10:30 P.M. on September 21st. 1961, for a stay of the proceedings before us. The clerk of the District Court was required to rush the filing of the record and appellee was called upon to file a brief, all in the course of twelve days. The whole procedure was in keeping with the government's practice of demanding, and most often receiving, special treatment.

make it impossible for me to set down, point by point, the reasons for my dissent. This opinion will, therefore, be confined to a detailed discussion of one or two points whose decision seem to me so glaringly wrong in the majority opinion and so distressingly destructive of the cooperative relationship which should exist between state and federal sovereignties.

I do not think that the order by the district court denying the motion for a temporary restraining order was appealable, and I do not, therefore, think that the case decided by the majority was properly before us. The majority admits that the question has never been decided by the Supreme Court or any Court of Appeals, but accepts the government's argument that the denial of the temporary restraining order was a final decision because of the special circumstances existing in this case.

Nor do I agree that the federal government, making this vicarious effort to protect Hardy from the criminal charges brought by the State of Mississippi against him, is immunized from the direct prohibitions of 28 U.S.C.A. § 2283. The statute states categorically that "A court of the United States may not grant an injunction to stay proceedings in a State court" except in those instances carefully spelled out in the residue of the statute. What the government seeks to do here does not come within the purview of any of those exceptions, and the attenuated argument of the majority to the contrary is to me wholly unconvincing. Without pausing to follow this portion of the majority opinion further, I refer the discussion of a like question which Judge Mize, United States District Judge, Southern District of Mississippi, so ably made in his decision in the case of the Application of Elizabeth

Porter Wyckoff for a Writ of Habeas Corpus, Civil Action No. 3140, Jackson Division of the U. S. D. C. for the Southern District of Mississippi, 196 F. Supp. 515, 518, et seq. I further adopt the reasoning of that decision and the authorities there cited to supplement what is here written.

I cannot refrain from saying a word in defence of Mr. Chief Justice Stone's landmark opinion on federal-state relationships in *Douglas et al v. City of Jeannette et al*, 1943, 319 U. S. 157. The attitude of the majority would, it seems to me, if followed, deal a crippling blow to this most important aspect of those vital relationships which constitute the bedrock of the Constitution of the United States. The majority devotes nearly ten pages of its opinion to a discussion of "the strictures of *Douglas v. Jeannette*." Its efforts to water down Jeannette and the manifold application of its teachings to the basic relationships of our dual sovereignty, conclude with a firm reliance upon the decision of this Court in *Morrison v. Davis*, 1958, 252 F. 2d 102, 103, certiorari denied, 356 U. S. 968, wherein this Court said: "To the extent that this [Browder v. Gayle] is inconsistent with *Douglas v. City of Jeannette, Pa.*, 319 U. S. 157, . . . we must consider the earlier case modified."

I think the position that *Jeannette* has been modified is wholly without authoritative support. Shepard's Citations show that the case has been cited one hundred forty times and, until the majority opinion here, its binding force had been questioned only in *Morrison v. Davis*, *supra*. What has happened since *Morrison v. Davis* rejects totally, in my opinion, the conclusion that *Jeannette* has been modified.

Until the present, *Morrison v. Davis* had been cited only once by an appellate federal court. A month after its rendition, it was referred to without approval by the Sixth Circuit in its decision of *Fuqua et al v. United Steel Workers, etc.*, March 28, 1958, 253 F. 2d 594, 598, in an opinion written by Judge (now Mr. Justice) Stewart, where it was said (page 597):

"A thorough discussion of these standards and of the important policy considerations which underlie them is found in Douglas v. Jeannette, 1943, 319 U. S. 157. . . .

"As there pointed out, federal courts of equity should conform to clearly defined Congressional policy, '. . . by refusing to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent. . . .

"It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. *No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief* since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction. . . . Where the threatened prosecution is by state officers for alleged violations of a state law, the state courts are the final arbiters of its meaning and application, subject only

to review by [the Supreme] Court on federal grounds appropriately asserted. . . .' "[2] [Emphasis added.]

As Judge Mize pointed out in his decision of *In Re Elizabeth Porter Wyckoff*, 196 F. Supp. 515, 518, et seq., supra, it appears that the Supreme Court itself has cited *Jeannette* three times since *Morrison v. Davis*. In *Speiser v. Randall*, 357 U. S. 513, *Jeannette* was cited in a concurring opinion by Mr. Justice Black in support of a point difference from that here under consideration. It was used to sustain another point by the majority opinion of the Supreme Court in *Monroe v. Pape*, 1961, 365 U. S. 167, 171, and by the disent-opinion of Mr. Justice Frankfurter, ib. at page 206.

In *Wilson v. Schnettler*, 1961, 365 U. S. 381, 385, *Jeannette* was cited with approval in the opinion of the court and also by the concurring opinion of Mr. Justice Stewart (page 388). The court there affirmed the action of the Court of Appeals of the Seventh Circuit, 1960, 275 F. 2d 932, which had followed *Jeannette* as controlling authority. In that case, concurred in by all of the Justices save three, the Supreme Court paraphrases the language of *Jeannette*, adhering, as of February 27, 1961, to principles which the majority here reject (365 U. S. at p. 385):

"There is still another cardinal reason why it was proper for the District Court to dismiss the complaint. *We live in the jurisdiction of two sovereignties. Each has its own system of courts to in-*

[2] The quoted language is of interest also in connection with what was said in Morrison v. Davis (P. 103): "Moreover we think the trial court here properly held: 'It is not the Court's view that in our civilization it is necessary to have incidents requiring arrests to have the rights of people declared.' "

terpret and enforce its laws, although in common territory. These courts could not perform their respective functions without embarrassing conflicts unless rules were adopted to avoid them. Such rules have been adopted. One of them is that an accused 'should not be permitted to use the machinery of one sovereignty to obstruct his trial in the courts of the other, unless the necessary operation of such machinery prevents his having a fair trial.' Ponzi v. Fessenden, 258 U. S. 254, 260. Another is that federal courts should not exercise their discretionary power 'to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent . . .' Douglas v. City of Jeannette, supra, at 163." [Emphasis added.]

The language emphasized in the above quotation, as well as in the last quotation from *Jeannette* (in Fuqua, supra) is extremely hard for the Judges who are bent upon the exaltation of federal sovereignty, the debasement of state sovereignty, to accept.

In *Pugach v. Dollinger*, 277 F. 2d 739, the Court of Appeals for the Second Circuit affirmed the action of a district judge who had refused to grant injunctive relief against a state criminal prosecution. The Court of Appeals based its affirmance on *Jeannette*. The Supreme Court affirmed in a per curiam opinion in *Pugach v. Dollinger*, 1961, 365 U. S. 458, basing its affirmance, however, upon the authority of *Schwartz v. Texas*, 344 U. S.

199, and *Stefanelli v. Minard*, 342 U. S. 117, two decisions in the long line which have upheld without deviation the principles of *Jeannette* which the majority declines to follow here.

The majority opinion makes a detailed recital of actions by the public officials of the State of Mississippi and Walthall County, which depicts these officials as wholly unworthy of trust, although they had been elected to their positions by the people of their counties or districts. This detailed recital goes, in my opinion, beyond what was necessary to a decision of the legal points presented by this appeal. The "strictures" were based largely upon statements made by a person of palpable irresponsibility who had come from a distant point into the State of Mississippi to stir up distrust between the races.

In the public press (The Tylertown Times of September 7, 1961) the editor of a newspaper stated:

> "In our interview, Hardy expressed skepticism to me about the existence of God. He said 'Why should I believe in a God that I can't see?' He told me he did not believe in service in the armed forces. 'Why should I go to defend a lie?', he said."

The same statement appears in a number of affidavits the originals of which are attached to the brief of appellees. Appellee's brief states: "It was agreed at this time, [that is, when the application of appellant for injunction pending appeal was presented to Judge Rives] that the appellees may file and make parts of their briefs as part of the record any affidavits which they so desired."

Appellee's brief further showed that all of the original affidavits filed had been served on the appellant within the time fixed by Judge Rives at that hearing. As far as I am advised, the appellant has never moved to strike the affidavits, or taken any other step to take them out of the record. Such an attitude would appear to be requisite in view of the fact that the government had not given the county and state officers an opportunity to file affidavits prior to the hearing before the court below.

It is to me a saddening spectacle to witness the publishing of decisions such as that of the majority here, which can have no other effect than to cause the people of the southland to look upon federal functionaries pursuing the course here presented to us, as "alien intruders."[3] I am constrained to repeat here words which I used in my recent dissenting opinion in *Roman v. Birmingham Transit Co.*, 292 F. 2d (advance sheets) 28-29:

> "It is the universal conviction of the people of the [South] also that the judges who function in this circuit should render justice in individual cases against a background of, and as interpreters of, the ethos of the people whose servants they are. This is the genius of the judicial system established by Congress and as traditionally administered by those who select the judges — a process, incidentally, which all know follows normal political lines. The statutes creating the United States Courts of Appeal require that only citizens who are residents of the respective circuits at the time shall be eligible for

[3]The language is that of the Supreme Court in Hecht v. Bowles, 1944, 321 U. S. 321, 329-330.

appointment, and that they shall continue to reside in the circuit during their term of office (28 U.S.C.A. § 44 (c)). For decades, in this circuit, Judges have been selected so that each state in the circuit shall be fairly represented on the court.

"It is the firm conviction of the [people of the South] also that decisions such as this one, in cases brought by or on behalf of Negroes and involving the equal protection clause of the Fourteenth Amendment, have not been in harmony with the spirit, thought and desires of the people, the vast majority of whom, in both races, know that their common problems can best be worked out if they are left alone to continue the unbroken improvement in relationships which has taken place in the last eight decades. They are keenly conscious of the fact that since the end of the tragic era following the War Between the States and in spite of the handicaps born of it, there has been a continuing growth in mutual understanding, respect and brotherhood between the members of the two races; and that the progress made by the Negroes in advancement educationally, socially, economically and in all other phases of their lives has exceeded that achieved by them anywhere else in any country at any time. That a breach in these relationships, achieved in the close and compassionate contacts which have taken place under such trying conditions should be permitted to occur is unthinkable to practically all of the people of good will of both races.

"The rank and file of Negroes, realizing the hardship under which they labor by reason of the head-start of several centuries enjoyed by white people, and proud of their race and its accomplishments, resent the efforts of the agitators who do not understand, to [throw into the courts matters of status and relationships which can best be worked out in the friendly atmosphere of close community contacts]. They feel, in common with their white neighbors, that the judges should perform their duties with a sympathetic understanding of the true facts; and further that such an understanding has been tragically lacking in many of the decisions of many of the Judges in the Fifth Circuit whose actions have gone so far to the other extreme that Time Magazine gave six of the Judges an enthusiastic write-up with photographs in its issue of December 5, 1960, page 14. The article, encircled in red for emphasis, was headed 'Trail-Blazers on the Bench — South's U. S. Judges Lead a Civil Rights Offensive.' It stated that the Judges extolled constituted 'an honor roll without precedent in United States legal annals' and that they had 'collectively . . . launched one of the great, orderly offensives of legal history.'"

This is not the time, in my opinion, for outsiders, unfamiliar with the intricate problems involved, to set neighbor against neighbor — to adopt a course which will ultimately lead to the destruction of the tolerance and understanding so necessary to the continued advancement of the interests of both races. At a time when the daily press is filled with stories of racial strife from every quarter of the globe, men of good will in this nation

ought, in my judgment, to be thankful that the two races in the South have, for more than a half century, avoided such strife and have advanced together in a spirit of brotherhood with a speed which those who take the trouble to learn the facts think is phenomenal. It is unthinkable that a handful of agitators, however sincere their motives may be, would be permitted to interrupt that advance and set the stage for another "Tragic Era."

I respectfully dissent.

Opinion of The United States District Court Southern District of Mississippi

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF MISSISSIPPI HATTIESBURG DIVISION

No. 1670

UNITED STATES OF AMERICA — Plaintiff

vs.

JOHN Q. WOOD, ET AL. — Defendants

The United States seeks a temporary restraining order under the 1957 Civil Rights Act to restrain the prosecution of a criminal case against John Hardy before a Justice of the Peace in Walthall County. The case is set for trial tomorrow, September 22, at 9:00 A.M. The offense with which he is charged is not clear from the complaint. John Hardy was arrested for the offense on September 7, 1961, and his case was set for trial on September 8 for the time stated. This application was presented to the Court in Meridian before noon on September 20. Consideration of the petition was deferred to afford notice to the Defendants who were served with process during the evening of September 20 returnable before the Court in Jackson at 1:30 P.M. on September 21.

The affidavits in this case portray a reprehensible course of conduct on the part of the Registrar of Walthall County but assurance is given that such unilateral statements of the witnesses probably couched in language of experienced counsel for the Government, will be contra-

dicted. But we are not concerned in this hearing with anything outside the very sharp question as to whether or not that criminal proceeding should be enjoined. While it must be presumed that John Hardy is innocent of everything with which he is charged, it must likewise be presumed that justice will be done in the trial of that case regardless of the result thereof. There is nothing before the Court to indicate anything to the contrary. But in the argument it is asserted that the trial of that criminal case tomorrow will irreparably damage the United States in deterring colored people in Walthall County from registering. That statement is without any substantial support in the record before the Court and appears as a non sequitur. In *Douglas v. Jeannette*, 319 U.S. 157, 163, it is said:

> "It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction."

The writ of injunction is an extra-ordinary process which must be issued with extreme care and caution to forestall injustice and inequitable injury by summary process. It is not asserted or even contended that the legal remedy available to John Hardy in that case is inadequate or that he will be denied due process or a fair trial. It is simply urged in such state of record that the United States will be irreparably damaged if that crimi-

nal case against John Hardy is not restrained. It is difficult to find any satisfactory definition of "irreparable" but it is equally difficult to conceive how the United States can possibly be irreparably damaged by this criminal case down in Walthall County, Mississippi, regardless of its outcome. This Court convenes in Hattiesburg early next month and the circumstances in this case warrant the assurance that it should be disposed of at that time on its merits. There is no election this year and the course of registrations in the interim will be immaterial except as evidence in this case. The suggestion of a restraining order to maintain the status quo is misleading and deceptive because of a natural imbalance created by the weight of the prestige of the court in an adjudication on either side of such a hotly disputed controversy as in this case.

It is my considered judgment that this Court has full jurisdiction of the parties and has the full power and authority to issue an injunction in a proper case only to assure the victor that his success has not been frustrated by a complete dissipation of the spoils of the suit. Such is not the case here. It is my judgment that the request for the restraining order in this case should be and is denied. Any other disposition of this request would constitute a clear pre-judgment of hotly contested factual issues in this case. It is my further judgment, as indicated, that these two cases against the Registrar should be consolidated and that the plaintiff should be given a trial of these cases on the merits as a preference matter at the coming term of this Court at Hattiesburg and every cooperation of the Court to that end will be afforded the plaintiff. An order may be presented by the United States Attorney denying such request for such restraining order if such an order is necessary or desirable.

APPENDIX

DENIAL OF MOTION FOR REHEARING BY THE FIFTH CIRCUIT COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19237

UNITED STATES OF AMERICA — Appellant

vs.

JOHN Q. WOOD, Registrar of Walthall County, Mississippi, et al. — Appellees

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U.S. COURT OF APPEALS
FILED
Nov. 30, 1961
EDWARD W. WADSWORTH
CLERK

ON MOTION FOR REHEARING

Before RIVES, CAMERON and BROWN, Circuit Judges.

PER CURIAM:

The motion for rehearing in the above-styled and numbered cause is hereby DENIED, and it is ORDERED that the mandate issue forthwith.

JUDGE CAMERON DISSENTS.

APPENDIX

TEXT OF CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Eleventh Amendment to the Constitution of the United States

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

Title 28 U.S.C.A., Section 1291

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Title 28 U.S.C.A., Section 2283

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Title 42 U.S.C.A., Section 1971

"(a) All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote

at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory; or by or under its authority, to the contrary notwithstanding.

"(b) No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates or Commissioners from the Territories or possessions, at any general, special, or primary election held solely or in part for the purpose of selecting or electing any such candidate.

"(c) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person. Whenever, in a proceeding instituted under this subsection any official of a State or subdivision thereof is alleged to have committed any act or practice, constituting a deprivation of any right or privilege se-

cured by subsection (a) of this section, the act or practice shall also be deemed that of the State and the State may be joined as a party defendant and, if, prior to the institution of such proceeding, such official has resigned or has been relieved of his office and no successor has assumed such office, the proceeding may be instituted against the State.

"(d) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law.

"(e) In any proceeding instituted pursuant to subsection (c) of this section in the event the court finds that any person has been deprived on account of race or color of any right or privilege secured by subsection (a) of this section, the court shall upon request of the Attorney General and after each party has been given notice and the opportunity to be heard make a finding whether such deprivation was or is pursuant to a pattern or practice. If the court finds such pattern or practice, any person of such race or color resident within the affected area shall, for one year and thereafter until the court subsequently finds that such pattern or practice has ceased, be entitled, upon his application therefor, to an order declaring him qualified to vote, upon proof that at any election or elections (1) he is qualified under State law to vote, and (2) he has since such finding by the court been (a) deprived of or denied under color of law the opportunity to register to vote or otherwise to qualify to vote, or (b) found not qualified to vote by any person acting under color of law. Such order shall be effective

as to any election held within the longest period for which such applicant could have been registered or otherwise qualified under State law at which the applicant's qualifications would under State law entitle him to vote.

"Notwithstanding any inconsistent provision of State law or the action of any State officer or court, an applicant so declared qualified to vote shall be permitted to vote in any such election. The Attorney General shall cause to be transmitted certified copies of such order to the appropriate election officers. The refusal by any such officer with notice of such order to permit any person so declared qualified to vote to vote at an appropriate election shall constitute contempt of court.

"An application for an order pursuant to this subsection shall be heard within ten days, and the execution of any order disposing of such application shall not be stayed if the effect of such stay would be to delay the effectiveness of the order beyond the date of any election at which the applicant would otherwise be enabled to vote.

"The court may appoint one or more persons who are qualified voters in the judicial district, to be known as voting referees, who shall subscribe to the oath required by section 16 of Title 5, to serve for such period as the court shall determine, to receive such applications and to take evidence and report to the court findings as to whether or not at any election or elections (1) any such applicant is qualified under State law to vote, and (2) he has since the finding by the court heretofore specified been (a) deprived of or denied under color of law the opportunity to register to vote or otherwise to qualify to vote, or (b) found not qualified to vote by any person

acting under color of law. In a proceeding before a voting referee, the applicant shall be heard ex parte at such times and places as the court shall direct. His statement under oath shall be prima facie evidence as to his age, residence, and his prior efforts to register or otherwise qualify to vote. Where proof of literacy or an understanding of other subjects is required by valid provisions of State law, the answer of the applicant, if written, shall be included in such report to the court; if oral, it shall be taken down stenographically and a transcription included in such report to the court.

"Upon receipt of such report, the court shall cause the Attorney General to transmit a copy thereof to the State attorney general and to each party to such proceeding together with an order to show cause within ten days, or such shorter time as the court may fix, why an order of the court should not be entered in accordance with such report. Upon the expiration of such period, such order shall be entered unless prior to that time there has been filed with the court and served upon all parties a statement of exceptions to such report. Exceptions as to matters of fact shall be considered only if supported by a duly verified copy of a public record or by affidavit of persons having personal knowledge of such facts or by statements or matters contained in such report; those relating to matters of law shall be supported by an appropriate memorandum of law. The issues of fact and law raised by such exceptions shall be determined by the court or, if the due and speedy administration of justice requires, they may be referred to the voting referee to determine in accordance with procedures prescribed by the court. A hearing as to an issue of fact shall be held only in the event that the proof in support of the excep-

tion disclose the existence of a genuine issue of material fact. The applicant's literacy and understanding of other subjects shall be determined solely on the basis of answers included in the report of the voting referee.

"The court, or at its direction the voting referee, shall issue to each applicant so declared qualified a certificate identifying the holder thereof as a person so qualified.

"Any voting referee appointed by the court pursuant to this subsection shall to the extent not inconsistent herewith have all the powers conferred upon a master by rule 53 (c) of the Federal Rules of Civil Procedure. The compensation to be allowed to any persons appointed by the court pursuant to this subsection shall be fixed by the court and shall be payable by the United States.

"Applications pursuant to this subsection shall be determined expeditiously. In the case of any application filed twenty or more days prior to an election which is undetermined by the time of such election, the court shall issue an order authorizing the applicant to vote provisionally: Provided, however, That such applicant shall be qualified to vote under State law. In the case of an application filed within twenty days prior to an election, the court, in its discretion, may make such an order. In either case the order shall make appropriate provision for the impounding of the applicant's ballot pending determination of the application. The court may take any other action, and may authorize such referee or such other person as it may designate to take any other action, appropriate or necessary to carry out the provisions of this subsection and to enforce its decrees. This subsection

shall in no way be construed as a limitation upon the existing powers of the court.

"When used in the subsection, the word 'vote' includes all action necessary to make a vote effective including but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted and included in the appropriate totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election; the words 'affected area' shall mean any subdivision of the State in which the laws of the State relating to voting are or have been to any extent administered by a person found in the proceeding to have violated subsection (a) of this section; and the words 'qualified under State law' shall mean qualified according to the laws, customs, or usages of the State and shall not, in any event, imply qualifications more stringent than those used by the persons found in the proceeding to have violated subsection (a) of this section in qualifying persons other than those of the race or color against which the pattern or practice of discrimination was found to exist.

"(f) Any person cited for an alleged contempt under this Act shall be allowed to make his full defense by counsel learned in the law; and the court before which he is cited or tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire, who shall have free access to him at all reasonable hours. He shall be allowed, in his defense to make any proof that he can produce by lawful witnesses, and shall have the like process of the court to

compel his witnesses to appear at his trial or hearing, as is usually granted to compel witnesses to appear on behalf of the prosecution. If such person shall be found by the court to be financially unable to provide for such counsel, it shall be the duty of the court to provide such counsel."

CERTIFICATE OF SERVICE

I, Dugas Shands, one of the attorneys of record for all Petitioners, do hereby certify that I have mailed, postage prepaid, air mail, special delivery, two true and correct printed copies of the foregoing petition for writ of certiorari to the Solicitor General, Department of Justice, Washington 25, D. C., and I further certify that I have this day mailed, postage prepaid, air mail, special delivery, to Honorable John Doar, Attorney, Civil Rights Division, Department of Justice, Washington 25, D. C., one of the attorneys of record for Respondent, two true and correct printed copies of the foregoing petition for writ of certiorari.

THIS THE 26th day of February, 1962.

Dugas Shands

DUGAS SHANDS, Assistant Attorney General of the State of Mississippi
New Capitol Building
Jackson, Mississippi

One of the attorneys of record for all Petitioners.